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No. 96-511

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, Attorney General
of the United States, *et al.*,

Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF *AMICUS CURIAE* OF VOLUNTEER LAWYERS FOR THE ARTS, VARIOUS ARTISTS AND ART ORGANIZATIONS IN SUPPORT OF APPELLEES

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Interest of *Amici*

Amici Robert Altman, Laurie Anderson, Jon Robin Baitz, Eric Bogosian, Robert Beaser, John Corigliano, David Del Tredici, Karen Finley, Timothy Greenfield-Sanders, Emily Hartzell and Nina Sobell a/k/a "Parkbench," Jenny Holzer, Tony Kushner, Craig Lucas, Philip Pearlstein, Lou Reed, Cindy Sherman, Kevin Smith, Ann Sperry and Oliver Stone are renowned artists whose work represents visual, musical and literary expression exemplifying many of the major artistic movements in the United States today. Examples of the artistic works of some of these *amici* are currently available for viewing, reading or listening through various "sites" on the World Wide Web and the Internet.[1] *Amicus* The New Museum of Contemporary Art is among the major not-for-profit and educational institutions and museums in the United States devoted to the collection, preservation and display of visual art; many of these institutions maintain "sites" on the Internet through which artistic images and other communications in their collections can be viewed, read or heard. *Amici* Metro Pictures, New York and Ronald Feldman Fine Arts Inc. are commercial art galleries engaged in the display and sale of creative artworks. *Amicus* Theatre Communications Group is a national organization devoted to American theater arts, with over 17,000 members. *Amici* Volunteer Lawyers for the Arts, Albany/Schenectady League of Arts, Inc., California Lawyers for the Arts, Colorado Lawyers for the Arts, Connecticut Lawyers for the Arts, Maine Volunteer Lawyers for the Arts, Maryland Lawyers for the Arts, St. Louis Volunteer Lawyers and Accountants for the Arts, Volunteer

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1. These defined terms have the meanings used in the opinion below. *American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) ("*ACLU*").

Lawyers for the Arts, D.C., and Volunteer Lawyers for the Arts of Massachusetts, Inc. are not-for-profit organizations providing legal services to artists and arts organizations with limited financial resources.

Amici urge the Court to affirm the decision of the three-judge district court in the Eastern District of Pennsylvania preliminarily enjoining appellants from enforcing, prosecuting, investigating or reviewing any matter premised upon Sections 223(a)(1)(B) and 223(a)(2) of the Communications Decency Act of 1996 (the "CDA"), to the extent such actions are based upon the alleged creation, display or transmission of materials other than obscenity or child pornography, and Sections 223(d)(1) and 223(d)(2) of the CDA. *Amici* submit this brief to stress the vital importance of public availability of artistic works, whose exhibitors are now subject to criminal prosecution under the CDA's prohibitions on the creation, display or transmission to minors via the Internet of "indecent" or "patently offensive" material.

Statement of the Case

The CDA criminalizes, *inter alia*, the creation and display or transmission of "images or other communications" which may be deemed "indecent" or "patently offensive" for minors, defined as persons under the age of eighteen. *See* 47 U.S.C. §§223(a)(1)(B), (a)(2); 223(d)(1), (d)(2).[2] The three-

2. Section 223(a)(1)(B) ("the indecency provision") provides in part that any person in interstate or foreign communications who, "by means of a telecommunications device," "knowingly . . . makes, creates, or solicits" and "initiates the transmission" of "any comment, request, suggestion, proposal, image or other communication which is obscene or *indecent*, knowing that the recipient of the communication is under 18 years of age," shall be criminally fined or imprisoned. (Emphasis added.)

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judge district court below, convened pursuant to Section 561(a) of the CDA and 28 U.S.C. §2284, preliminarily enjoined appellants from enforcing these provisions of the CDA as unconstitutional on their face. *ACLU*, 929 F. Supp. at 883-84.

The Court has jurisdiction over the Government's appeal pursuant to Section 561(b) of the CDA.

Summary of Argument

1. The Court has long recognized that artistic expression is as entitled to protection under the First Amendment as classic political or written "speech." The communication and exchange of ideas, expressed and received through a myriad of visual images, text and aural communications, is not limited to the spoken or typewritten word. Few speeches on the evils of war can surpass, for example, the shattering folly depicted in Picasso's *Guernica*; few tracts on human beauty do not pale next to Michelangelo's statue of the nude *David* (Exhibit A-1).

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Section 223(d)(1) ("the patently offensive provision"), makes it a crime to use an "interactive computer service" to "send" or "display in a manner available" to a person under age 18, "any comment, request, suggestion, proposal, image, or other communication that, *in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs*, regardless of whether the user of such service placed the call or initiated the communication." (Emphasis added.)

Sections 223(a)(2) and 223(d)(2) make it a crime for anyone to "knowingly permit[] any telecommunications facility under [his or her] control to be used for an[y] activity prohibited" in Sections 223(a)(1)(B) and 223(d)(1), and impose a punishment of a fine, up to two years imprisonment, or both for each offense.

2. The Internet is truly "the most participatory form of mass speech yet developed." *ACLU*, 929 F. Supp. at 883. By enabling for the first time the worldwide, instantaneous and nearly cost-free transmission of images, sound and text, the Internet substantially reduces many of the practical obstacles to widespread access to creative works. DaVinci's *Mona Lisa* no longer looks down only upon those privileged enough to enjoy a Parisian vacation; through the remarkable vehicle of the Internet, she now casts her smile simultaneously from Addis Ababa to Zanzibar. The Internet is also the first mass medium in which art need not be static: many new artistic creations available on the Internet are evolving products of audience response and participation, a worldwide give-and-take of unprecedented scope and creativity.

3. While *amici* do not quarrel with the CDA to the extent that it covers hard-core obscenity or child pornography, which were already proscribed before the CDA's adoption,[3] the CDA's prohibitions on the creation, display or transmission of "indecent" and "patently offensive" images and communications on the Internet unconstitutionally burden the creation and dissemination of art. By proscribing an amorphous array of constitutionally protected speech in a manner which is not narrowly tailored to advance the Government's compelling interest in protecting minors, the CDA sweeps so broadly and vaguely as to act as a virtual ban on a substantial amount of artistic expression, violating the constitutional rights of both adults and minors to receive and transmit such speech.

4. The "safe harbor" provision of Section 223(e) of the CDA makes available to content providers on the Internet the

3. 18 U.S.C. §§1464-65 (criminalizing obscene material); *id.* §§2251-52 (criminalizing child pornography).

potential defenses of debit and credit card verification, adult verification by password or adult personal identification number, or labeling-and-blocking of "indecent" or "patently offensive" material. While *amici* do not oppose an effective, narrowly-tailored method of restricting access by minors to limited types of these materials, the methodology described in Section 223(e) is presently "effectively unavailable for non-commercial, not-for-profit entities," *ACLU*, 929 F. Supp. at 849, and thus acts effectively as a ban on the creation and display or transmission of artistic works protected by the First Amendment.

Argument

I. ARTISTIC EXPRESSION IS ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT

The artistic impulse is as old and widespread as humankind itself. From the Paleolithic cave paintings of southwest France, to the ancient ritual songs of Africa, to classical Greek drama and sculpture, to the "hip-hop" music of today's inner-city youth, human beings have always sought to express themselves through visual, aural and textual works of the imagination. Through the creation and display of their work, artists endeavor to communicate with others and affect the world around them. Some art is connected to religion or magic: the cave paintings of our ancestors, the depictions of Madonna and Child produced in the Renaissance (Exhibit A-2), and the Bharata Natyam dance of India are but a few examples. Sexual symbols, in the form of phallic sculptures (Exhibit A-3) and female figures with overemphasized breasts and buttocks (Exhibit A-4), abound in art as symbols of the fertility of the land and its people. The human body has been a departure point for dance and visual art from ancient times to the present day, as

exemplified by the 12th century depiction of the Goddess Sarasvati (Exhibit A-5), a photograph by Edward Weston (Exhibit A-6), and a sculpture by Louise Bourgeois (Exhibit A-7).

Artists are no strangers to controversy or censorship. They often deliberately provoke their audience, goading us to question ourselves and the world around us. Aristophanes did so in his *Lysistrata* (Exhibit B-1), a bawdy plea for peace, and Cindy Sherman does so today in her deliberately disturbing images of deconstructed doll bodies with sexual organs (Exhibit A-8). These provocations are by no means unthinking; rather, they are intended to prod us to greater examination and analysis. The glory of both our Constitution and this Court's jurisprudence is the recognition of the importance of such artistic expression.

There is no question that the First Amendment shields more than classic political speech. Thus, for example, the Court has extended First Amendment protection to entertainment, *Winters v. New York*, 333 U.S. 507, 510 (1948); film, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); theater, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975); music, without regard to words, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); and parades, with or without banners or written messages, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, ____ U.S. ____, 115 S. Ct. 2338, 2345 (1995).

As the Court recently acknowledged, "the Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 115 S. Ct. at 2345. If the First Amendment reached only "expressions conveying a 'particularized message,'" its protection "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Id.*, quoting *Spence v. Washington*, 418 U.S. 405, 411 (1974) (*per curiam*).[4]

Thus, the First Amendment's fundamental purpose is to protect peaceful expression in all of its myriad manifestations. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' But our cases have never suggested that expression about philosophical, social, artistic, economic, literary or ethical matters . . . is not entitled to full First Amendment protection") (citations and footnote omitted); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. at 501 (1952) (motion pictures are fully protected expression that "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression").[5]

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4. "Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. Indeed, written language is far more constricting because of its many variants — English, Japanese, Arabic, Hebrew, Wolof, Guarani, etc. — among and within each group and because some within each language group are illiterate and cannot comprehend their own written language. The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate. As the Supreme Court has reminded us, visual images are 'a primitive but effective way of communicating ideas . . . a short cut from mind to mind'." *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) (footnotes omitted), quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943).

5. Even when dealing with obscenity, the Court has recognized that the First Amendment prohibits government regulation as "obscene"

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Modern-day visual, textual and aural creative expression — from the plays of Tony Kushner, to the photographs of Robert Mapplethorpe and Cindy Sherman (Exhibit A-8), to the songs of Alanis Morissette, to the paintings of Robert Colescott (Exhibit A-9), to the performance art of Karen Finley, to the films of Robert Altman and Oliver Stone, and on and on — is under the Constitution entitled to the full protection of the First Amendment. The marketplace of ideas is not limited in its forms of expression.

II. UNLIKE ALL PREVIOUS MEDIA, THE INTERNET HAS THE POTENTIAL TO ELIMINATE ECONOMIC AND CULTURAL BARRIERS TO THE WIDESPREAD COMMUNICATION AND UNDERSTANDING OF ARTISTIC EXPRESSION

The Internet has already proved itself truly revolutionary in its capacity to reduce economic and cultural barriers to the widespread communication and understanding of artistic expression. Unlike other forms of media, what has been labeled the world's "new town square"[6] allows not only the passive receipt of information, but also immediate, one-to-one, one-to-many and many-to-one responses and ongoing dialogue via on-line "chat rooms" regarding artistic images, sounds and text. *See ACLU*, 929 F. Supp. at 881 ("It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of

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those works which have "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 26 (1973).

6. President William J. Clinton, State of the Union Address, February 4, 1997.

mass speech that this country — and indeed the world — has yet seen"); *Shea v. Reno*, 930 F. Supp. 916, 922 (S.D.N.Y. 1996) ("[E]merging media technologies quite simply offer an unprecedented number of individual citizens an opportunity to speak and to be heard — at very little cost — by audiences around the world. In that sense, we are encountering a communications medium unlike any we have ever known").

The ever-expanding use of the Internet has led to the daily display and transmission of thousands of images and communications, created and received by an ever-more-diverse population of Internet users. The consequences of providing significant and relatively equal access to all who wish to speak on the Internet has been an astounding explosion in both the diversity of artistic expression and the public's access to those creative labors.[7] For the first time,

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7. Recent articles hailing artistic initiatives on the Internet include the following: Robin Williams, *Robin's World: Art and the Internet in Santa Fe*, The Santa Fe New Mexican, February 2, 1997; *First Night International Premieres Virtual First Night '97, An Internet Celebration*, PR Newswire, Boston, Massachusetts, December 16, 1996; Robert Simonson, *Arts Organizations Continue to Embrace Internet*, Information Access Company, November 15, 1996; Mitch Wagner, *The Internet Gallery: Digital Commerce to Link Fine-Art Buyers, Sellers on the Web*, Computerworld, November 11, 1996; Annette Cardwell, *Cyberspace: NEA Plugs In, Linking Artists on the Internet*, Boston Herald, October 25, 1996; *Internet Work of Art, Priced at Zero Francs, Sells for 58,000*, Agence France Presse, Paris, October 16, 1996; *The Fine Arts Museum of San Francisco Hosts the World's Largest Art Opening*, Business Wire, San Francisco, California, September 30, 1996; Timothy C. Barmann, *CYBERTALK — Art World Takes to the Internet*, Providence Journal Bulletin, September 1, 1996.

Searches with the "Yahoo" Internet search engine alone (*http://www.yahoo.com/arts/*) locate thousands of sites referring to the arts. For example, as of February 20, 1997, 651 sites are listed when the phrase "art history" is searched, 740 when "artists" is

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individual, relatively "unknown" artists and small, not-for-profit organizations — previously unable to afford the means to reach a widespread audience for their endeavors — can now instantly gain access to a worldwide public, simply by establishing a "home page" on the World Wide Web and inviting "visitors" to that site to explore further, or by establishing "links" from other Internet sites to their own creative works. Through the Internet's unique ability to widely disseminate these works for both public appreciation and potential purchase, aspiring playwrights, novelists, filmmakers, poets, painters, sculptors, musicians and performance artists can sustain and support their artistic endeavors.

Museums, libraries and other educational institutions with collections of vast artistic and social value can finally, through the Internet, display their full collections to an enormous array of people, far more than could previously afford to travel to those institutions themselves.[8] The

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searched, 3,424 for "visual arts," 1,887 for "design arts" and 2,041 for "performance arts."

8. The National Gallery of Art in Washington, D.C. (*http://www.nga.gov*) currently has over 10,000 color images of its works available on the Internet, including Monet's *The Bridge at Argenteuil* and Peter Paul Rubens' *Assumption of the Virgin*. Other museums with sites on the Internet include the Museum of Modern Art in New York City (*http://www.moma.org*), featuring Pablo Picasso's *Les Demoiselles D'Avignon* and Piet Mondrian's *Broadway Boogie Woogie*; the Fine Arts Museum of San Francisco, with a database of over 60,000 images (*http://www.thinker.org*); the Louvre (*http://mistral.culture.fr/louvre/*); the New York Public Library of the Performing Arts (*http://www.nypl.org/research/lpa/html*); New York's Lincoln Center (*http://www.linconcenter.org/*); the Brooklyn Academy of Music (*http://www.bam.org/*); the Juilliard School

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convenience and economy of "virtual" visits to an Internet site maintained by an artist, author, musician, filmmaker, gallery, museum or library means that those who were once too poor, too busy, too far away or too intimidated to view, read or listen to artistic expression can now freely receive those works of art.[9] Greater discussion, contemplation and understanding of those works — running the gamut from awestruck appreciation to passionate dislike — is the inevitable and desired result.

In addition, the urge to create — now driven by the knowledge that one's creation may see the daylight of public discussion — continues to swell the tide of diversity in creative artistic expression on the Internet. Much in the way the new medium of video created video artists, the Internet is creating Internet artists out of those who have used different media in the past, as well as those who are emerging for the first time amid the flowering of this new form of expression. "Parkbench," for example, an artistic collaboration between Emily Hartzell and Nina Sobell, links the artists' performance about the creative process, conducted in their studio, to the World Wide Web via video link. Jenny Holzer,

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(*http://www.juilliard.edu/*); Writers Guild of America (*http://www.wga.org/*); the Whitechapel Gallery (*http://www.dircon.co.uk/artonline*); the Smithsonian Institution (*http://www.si.edu*); the Library of Congress (*http://www.loc.gov*); and the American Film Institute (*http://www.afionline.org/home.html*).

9. Even a trip to a particular museum does not guarantee an opportunity to review that institution's full collections, since many museums are as a practical matter unable to publicly showcase more than a small portion of their collections at any one time. No such practical limitation on the display or transmission of artistic images, text or sounds exists with the Internet.

best known for her printed, incised and electronic light-emitting diode text work, now creates on her own Web page, allowing visitors to wander through her creations in any order they choose and to add their personal variations. In her exhibition, "Fear of Offending" (due to open at Los Angeles' Museum of Contemporary Art on March 16, 1997), performance artist Karen Finley asks visitors to the Museum's physical and "virtual" sites to respond to the question, "What do you find offensive?" The responses will be displayed in "real time" on a fountain in the actual gallery and on-line, and will be archived at the Museum (*http://www.moca.org*).

Literary magazines and experiments are also flourishing on the Internet, bringing a new look and sound to the written craft. The Internet's format, with its integration of color, text, "hypertext,"[10] graphics, and sound, has created a new literature. Writers, experimenting with the possibilities, are creating poems and stories which fuse all these elements. If a poem speaks about "mother," a click on that word may bring the reader to a discussion of the poet's mother, a visual representation of her, or even an "audio streaming"[11] of her speaking to the poet. Some writers are experimenting with visual representation of their poetry. Others speak the work aloud as the reader visually scans it, creating a spoken word experience.

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10. Hypertext is coded words and images that appears in bright colors on the computer screen. When "clicked on" by an Internet user, hypertext brings the user to other Internet locations which discuss the hypertext in greater depth.

11. Audio streaming is the technology whereby aural communications can be heard via the Internet. Poetry or a music concert in real-time (*i.e.*, occurring live) can thus be heard with the use of a computer sound-card.

Performances are taking place on the Internet. The Australian artist "stelarc" performs a type of piece he calls "URL body," in which viewers input data into their computers which emerges, via sensors attached to the artist's body, as sensory input stimulating him to move. The performance is literally constructed by the viewers. Musicians also have Web pages listing their lyrics and often inviting interaction with site visitors. Concerts are now "Webcast" live; unhampered by the limitations upon radio waves, which can travel only limited distances, the Internet allows the listener unlimited possibilities for musical pleasure. Filmmakers, via "video streaming," can send their films out to home viewers. Technology is emerging which will soon change what is a somewhat flickering image to a fully-resolved one, enabling filmmakers to transmit, and people in their homes to download, feature-length films.

Art galleries, too, are taking advantage of Internet initiatives. The Union Galleries in Madison, Wisconsin this year held its Ninth Annual Computer Art Invitational, for which artists were required to create new works specifically for display in the gallery (*http//www.visual.arts.ewu.edu*). The University of Southern California is creating a "virtual museum," where visitors employ virtual reality goggles to simulate walking around a sculpture by Auguste Rodin (*http://digimuse.usc.edu/museum.html*).

In sum, the Internet's ability to interconnect media is providing a new arena for collaborative work and viewer interaction on a truly global scale.

III. THE CDA'S "INDECENCY" AND "PATENTLY OFFENSIVE" PROVISIONS ARE UNCONSTITUTIONALLY OVERBROAD

Because the concepts of "indecency" and "patently offensive" vary from community to community (with mere

nudity being declared offensive in some communities[12]), the CDA sweeps into its path some of the greatest works in art history. The statutory language of the CDA's "indecency" and "patently offensive" provisions is unconstitutionally overbroad, since it includes within its ambit (a) artistic creations that cannot seriously be prohibited from viewing by minors; and (b) materials which the adult public has the constitutional right to receive. In criminalizing speech well beyond the traditionally proscribed activities of hard-core obscenity and child pornography, the CDA throws the bathwater out with the baby.

A. Minors Have The Right To Create, Display And Receive Certain "Indecent" And "Patently Offensive" Speech

The CDA impermissibly restricts the right of minors to create, display and receive certain speech which falls under the statute's definition of "indecent" and "patently offensive" speech. As the Court recognized in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975), "[m]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined

12. People For The American Way publishes an annual book entitled, "Artistic Freedom Under Attack," detailing artwork which has been subject to attack. We credit them for the following two examples of what was found "offensive" in America in 1996: in Berthoud, Colorado, eight pastel figure drawings by David Mesple of realistically-rendered female nudes without genitalia were removed from a community center art display because their depiction was thought inappropriate for children; artist Stephen Halko's "Standing Nude Female," an award-winning charcoal sketch depicting a naked female figure from the neck down, with full frontal nudity, was removed from a student art exhibit at William Penn High School in New Castle, Delaware.

circumstances may government bar public dissemination of protected materials to them." *See also ACLU*, 929 F. Supp. at 853 (noting absence of showing that Government has a "compelling interest" in preventing a seventeen-year-old minor from gaining access via the Internet to images of, *inter alia*, sculptures in India of copulating couples or Francesco Clemente's painting, *Labirinth*).

Some of the greatest treasures of art history are currently available on-line via the Internet, and a substantial number of those images depict nudity to some degree. The broad language of the CDA encompasses many of these works: it is ironic that a seventeen-year-old college freshman, having just seen during an introductory art history lecture the sexual organs of the *Venus of Willendorf* (Exhibit A-4) or the bestiality of Picasso's *Minotaur* (Exhibit A-12) and the violence of his *Les Demoiselles d'Avignon* (Exhibit A-13), and having during her freshman English seminar discussed Tony Kushner's Pulitzer Prize-winning *Angels in America*, a contemporary play about love, politics, and the scourge of AIDS (Exhibit B-2), could not then return to her dormitory room and view those images ~~and~~ text on the Internet. Even the descriptions of nascent sexuality contained in Anne Frank's *Diary of a Young Girl* (Exhibit B-4), a classic of Holocaust literature written by a minor, could subject to prosecution under the CDA one who provides the text "on-line" to college freshmen.

Similarly, implementation of the CDA would mean that the transmission of the sexually explicit song lyrics of popular modern-day musicians such as Alanis Morissette (Exhibit B-5), Nine Inch Nails, Janet Jackson (Exhibit B-3), Coolio and Velvet Underground — presently widely available to teenage minors in music stores, libraries and on radio broadcasts — would constitute criminal conduct when made available for listening on the Internet.

B. The Adult Public Has The Right To Create, Display And Receive "Indecent" And "Patently Offensive" Speech

However "indecent" or "patently offensive" the speech at issue, the Court has recognized that it is absolutely protected as concerns the adult public. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment; and the federal parties do not submit that the sale of such materials to adults could be criminalized solely because they are indecent").

Thus, the Court has repeatedly held that the desire to protect adults from offensive messages or speech is insufficient to justify content-based regulation of such speech. "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978); *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) ("An 'outrageousness' standard thus runs afoul of our long-standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience"); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (same re "dignity" standard); *Carey v. Population Services International*, 431 U.S. 678, 701 (1977) ("[w]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the

expression of an idea simply because society finds the idea itself offensive or disagreeable").[13]

That is not to say that such constitutionally protected speech may not be regulated. *Sable Communications*, 492 U.S. at 126 ("[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). However, as the Court has recognized, "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.* Here, rather than being carefully tailored to address an appropriate compelling interest, the CDA effectively acts as a ban on all adult-to-adult communication of artistic creations which may fall under the statute's rubric of "indecent" or "patently offensive" material.

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13. The Court long ago rejected the contention that speech may be regulated or suppressed because it "attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry." *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959) (overturning a licensing provision that refused a permit to the film *Lady Chatterly's Lover* on the ground that its depiction of an adulterous relationship was "immoral"); *Joseph Burstyn, Inc.*, 343 U.S. at 505 ("[t]he state has no legitimate interest in protecting any or all religions from views distasteful to them . . . It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures").

C. The CDA Acts As A Virtual Ban On Adult-To-Adult Communication of "Indecent" And "Patently Offensive" Speech

Because it is the very nature of the Internet that any display on a Web site is necessarily available to those under 18 years old, the CDA acts as a virtual ban on adult-to-adult communication of "indecent" and "patently offensive" speech. In *Sable Communications*, the Court struck down under the First Amendment a statutory ban on indecent "dial-a-porn" commercial telephone communications, holding that the statute's "denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages." 492 U.S. at 131. While acknowledging the "compelling interest in protecting the physical and psychological well-being of minors," 492 U.S. at 126, the Court in *Sable* recognized that the challenged regulation would have the "invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." *Id.* at 131.

The commercial "dial-a-porn" services held protectible in *Sable Communications* had no claim to serious artistic value. The proscriptions of the CDA, however, reach out to criminalize the display on the Internet of such acknowledged works of art as Philip Pearlstein's *Punch On a Ladder*, with its rendition of two female nudes (Exhibit A-10), Rodin's *The Kiss*, depicting a sexual embrace (Exhibit A-11), Aristophanes' *Lysistrata* (Exhibit B-1), or Pablo Neruda's *The Widower's Tango*, with its poetic description of a lover urinating (Exhibit B-6). The CDA acts as a virtual ban on the communication of such text and images, because no content provider on the Internet will reasonably risk criminal prosecution for text or images which may be found "indecent" or "patently offensive" somewhere in the nation. *See Shea v. Reno*, 930 F. Supp. 916, 923 (S.D.N.Y. 1996)

(three-judge panel concluded that plaintiff challenging the "patently offensive" provision of the CDA "has demonstrated a likelihood of success on his overbreadth claim, that § 223(d) would serve as a ban on constitutionally protected indecent communications between adults").

By effectively banning indecent or patently offensive but not obscene adult-to-adult communications on the Internet, the CDA trammels upon the constitutional rights of the adult public to create, display and transmit "indecent" or "patently offensive" speech. Through the display of such images, sound and text, the posting of one-to-many communications, dialogue in on-line "chat rooms," and other forms of participatory speech on the Internet, adults have the potential to reach that portion of the worldwide adult public which may choose to see, read, or listen to these messages. Like the private telephone communications at issue in *Sable*[14], the Internet is a medium in which participants affirmatively elect

14. "The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in [*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (concluding that special treatment of indecent radio broadcast was justified)]. In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication. There is no 'captive audience' problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." *Sable Communications*, 492 U.S. at 127-28.

to participate by "dialing in" and "clicking on" specific Internet sites.[15]

D. The CDA's Qualifying Use of "In Context" and "Contemporary Community Standards" Does Not Save The "Patently Offensive" Provision From Overbreadth

The CDA's use of the term, "in context," to qualify those proscribed images and communications which are "patently offensive," offers no guidance to the potential creation, display or transmission of artwork. It is not at all clear what "context" is being referred to in Section 223(d): the context of a particular image or communication itself, the context of a larger work containing that image or communication, or the context of the Internet medium itself.[16] The phrase, "in

15. The Internet mandates an active search for material by its users through the use of "search engines" which require the user either to enter specific words or pose specific inquiries. As the court below found, "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident' . . . . Although content on the Internet is just a few clicks of a mouse away from the user, the receipt of information in the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial." *ACLU*, 929 F. Supp. at 844-45; *see id.* at 852 ("[I]t is highly unlikely that a very young child will be randomly 'surfing' the Web and come across 'indecent' or 'patently offensive' material") (Sloviter, J.).

16. As the court below observed, Internet technology undercuts the argument that the "in context" element of §§223(a) and 223(d) will always insulate individuals who present graphic sexual content (*e.g.*, AIDS counseling regarding condom use) embedded in a larger work, since "the use of links effectively excerpts that document by eliminating content unrelated to the link." *ACLU*, 929 F. Supp. at 871 n.11 (Dalzell, J.).

context," is thus both overbroad and unconstitutionally vague. (*See infra* at Part IV).

Nor can one who wishes to create, display or transmit artwork find comfort in the CDA's qualification of the term "patently offensive," as "measured by contemporary community standards." It is a commonplace that the contemporary community standards in Los Angeles and New York City are far different than those community standards which prevail in Topeka or Montgomery.

Criminal prosecutions for material alleged to be "patently offensive" in some communities are all too fresh in the recent memory of the artistic community. In 1990, a Broward County, Florida judge banned the sale of the album entitled "Nasty As They Wanna Be" by the rap music artists, 2 Live Crew, because he found it offensive and a violation of his community's standards of decency. Also in 1990, a Chicago photographer had his apartment raided by the FBI and local police, who seized his prints, negatives and equipment on the ground that his photographs of families and adolescent girls in the nude, which had been widely exhibited in museums and galleries, constituted child pornography. In Fall 1995, the police arrested the owner of a Cincinnati film rental store for "pandering obscenity" because his store rented a video by acclaimed Italian filmmaker Pier Pasolini. In the same city, the director of the Contemporary Art Center, Dennis Barrie, was charged in 1990 with obscenity for displaying the photographic works of Robert Mapplethorpe. While Mr. Barrie was ultimately acquitted, his fear of prosecution was all too well-founded.

The Internet has for the first time in history made the global local, creating a worldwide community of "Netizens" (as they refer to themselves), without geographic borders and with diverse and often divergent cultural values. One who places an artistic image or communication on the Internet can have no way of knowing what zealous prosecutor will seek to

apply his or her community's standards to that work: rather than risk offending a very few, the artist, gallery, museum or literary magazine facing the challenged criminal provisions of the CDA must forsake the opportunity to communicate with the very many.

IV. THE CDA'S "INDECENCY" AND "PATENTLY OFFENSIVE" PROVISIONS ARE UNCONSTITUTIONALLY VAGUE

The CDA's prohibitions on "indecent" and "patently offensive" images and other communications are also unconstitutionally vague, since those terms are not clearly defined by the statute. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech . . . , a more stringent vagueness test should apply.") (citations omitted); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

Even if one were to assume that the word, "indecent", as used in the CDA is synonymous with the CDA's use of the phrase, the depiction or description of sexual or excretory activities or organs in a manner "patently offensive as measured by contemporary community standards,"[17] those terms do not have a sufficiently clear meaning when applied to the Internet. The issue of what "community" will apply its

17. This conclusion, urged by appellants, is not supported by a facial reading of the statute. *ACLU*, 929 F. Supp at 861 (Buckwalter, J.); *see also id.* at 856 (Sloviter, J.).

standards to material posted on the Internet is not at all clear: if some uniform national standard of "indecency" is intended, there is no means for ascertaining the scope and nature of that standard. If the relevant community is perhaps instead one where the information is received and where the local jury sits, *see Sable Communications*, 492 U.S. at 125, then every content provider on the Internet must ascertain and comply with the widely disparate community standards of every "community" in the nation or risk criminal prosecution.[18]

This is not an academic issue. No museum or gallery can lightly place on the Internet images of Edouard Manet's *Déjeuner sur l'Herbe (Luncheon on the Grass)*, containing full frontal female nudity (Exhibit A-14)[19], or Egon Schiele's *Autoportrait Se Masturbant* (Exhibit A-15), with its explicit depiction of a sexual act, without fear of criminal prosecution for indecency or patent offensiveness under the CDA.[20]

18. "This conflict inevitably leaves the reader of the CDA unable to discern the relevant 'community standard,' and will undoubtedly cause Internet users to 'steer far wider of the unlawful zone' than if the community standard to be applied were clearly defined. The chilling effect on the Internet users' exercise of free speech is obvious. This is precisely the vice of vagueness." *ACLU*, 929 F. Supp. at 863 (Buckwalter, J.) (citations omitted).

19. *See Finley v. National Endowment for the Arts*, 100 F.3d 671, 684 (9th Cir. 1996) (Kleinfeld, J., dissenting) ("Every general art history textbook reproduces and discusses Edouard Manet's *Luncheon on the Grass*, a painting of a nude woman looking at the artist while two fully clothed men sit next to her and talk to each other. The content and viewpoint doubtless offend, but the art history books are constitutionally protected regardless. There can be no constitutional excuse for allowing the government to censor art on grounds of indecency or offensiveness").

20. "Unlike in the obscenity context, indecency has *not* been defined to exclude works of serious literary, artistic, political or scientific value, and therefore the Government's suggestion that it will not be used to

(Footnote continued on next page)

Similarly, no author or songwriter can make available on the Internet Cole Porter's *Love for Sale* (Exhibit B-7), containing lyrics regarding prostitution, or the graphic description of rape in Alice Walker's acclaimed literary work, *The Color Purple* (Exhibit B-8), without the same legitimate concern. It is no exaggeration to suggest that any one of these artistic, literary or musical creations could meet the CDA's definition of "indecent" or "patently offensive," and thus subjects one who creates and displays or transmits such works on the Internet to potential criminal prosecution.

V. THE STATUTORY "DEFENSES" OF THE CDA ARE EFFECTIVELY UNAVAILABLE TO NON-COMMERCIAL ENTITIES

It is undisputed that the Internet is an "especially attractive means for not-for-profit entities or public interest groups to reach their desired audiences." *ACLU*, 929 F. Supp. at 842. While *amici* do not oppose an effective, affordable and narrowly-tailored means by which to limit access by minors to certain "indecent" or "patently offensive" materials on the Internet while preserving the rights of the adult public to create, display and transmit such materials, the defenses established by the CDA — debit or credit card verification, adult verification by password or adult personal identification number, and "tagging" and blocking of prohibited material — are for the reasons noted by the court below, not presently viable for non-commercial, not-for-profit entities or impecunious artists. *ACLU*, 929 F. Supp. at 849; *accord*, *Shea v. Reno*, 930 F. Supp. 916, 922 (S.D.N.Y.

(Footnote continued from previous page)

prosecute publishers of such materials is without foundation in the law itself." *ACLU*, 929 F. Supp. at 863 (Buckwalter, J.).

1996) (three-judge panel concluded that "[t]he technological impossibility of independent compliance with the affirmative defenses renders § 223(d) [of the CDA] unconstitutional as an overbroad prohibition on constitutionally protected indecent speech between adults").

The medium-specific inquiry employed by the Court in *Pacifica*, *Sable Communications*, and most recently in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, ___ U.S. ___, 116 S. Ct. 2374, 2390-94 (1996) (striking down under First Amendment statutory requirement that cable television system operators segregate and block "patently offensive" sex-related material on leased channels in order to protect minors), is the appropriate inquiry here. Unlike radio broadcasts or cable television transmissions — where program providers have the ability to act as central "gatekeepers" in determining content and timing of transmitted material — the uniquely diffuse and democratic nature of the Internet is such that no "gatekeeper" can effectively monitor and control program content.

Amici support the development of mechanisms by which parents and those who create, display or transmit artistic images and communications on the Internet may themselves elect to prevent children from viewing, reading or hearing their works. Until that day arrives, however, our cherished First Amendment freedoms cannot be threatened by a regulatory system that chills creative artistic expression by subjecting artists to criminal prosecution for material which both adults and minors have the right to receive.

Conclusion

For the foregoing reasons, the judgment of the three-judge court in the Eastern District of Pennsylvania should be affirmed.

Respectfully submitted,

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February 20, 1997

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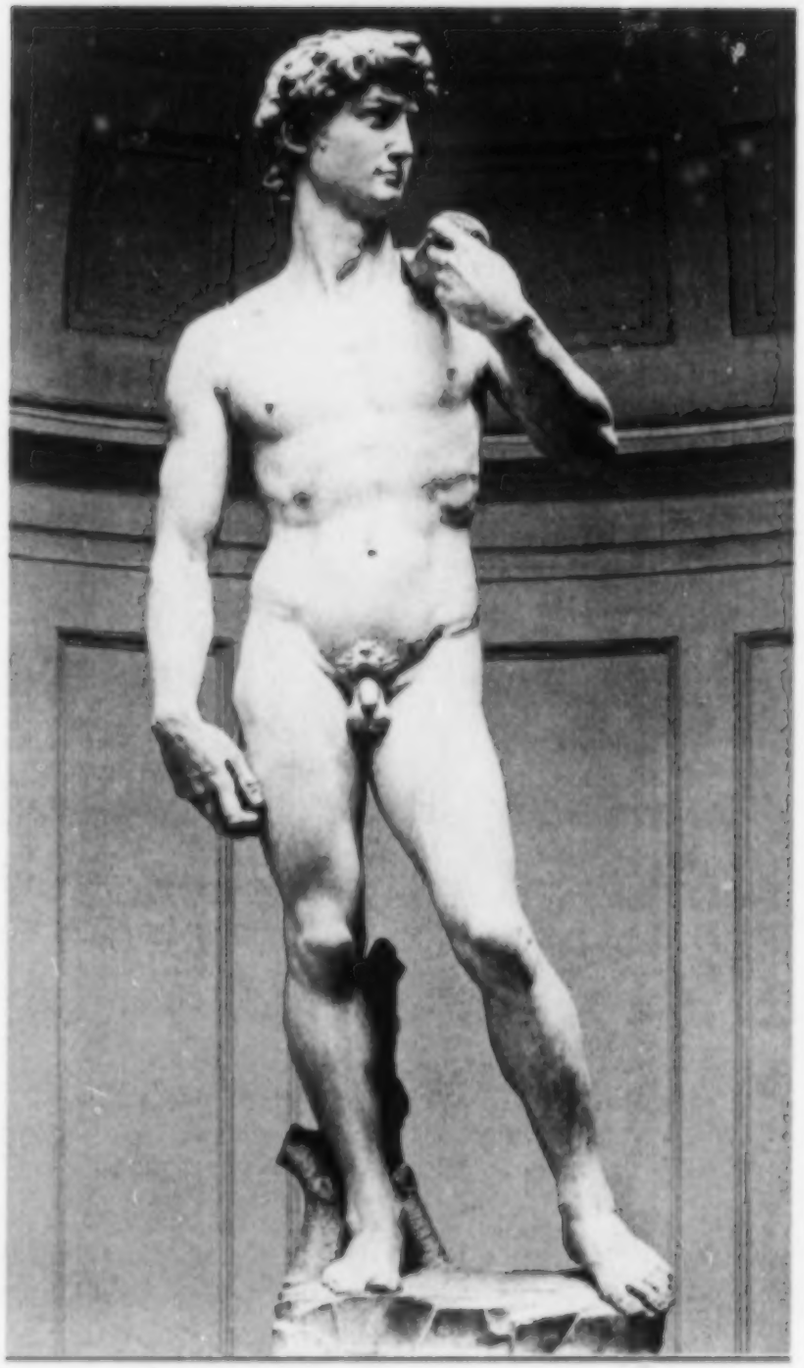
APPENDICES

APPENDIX A

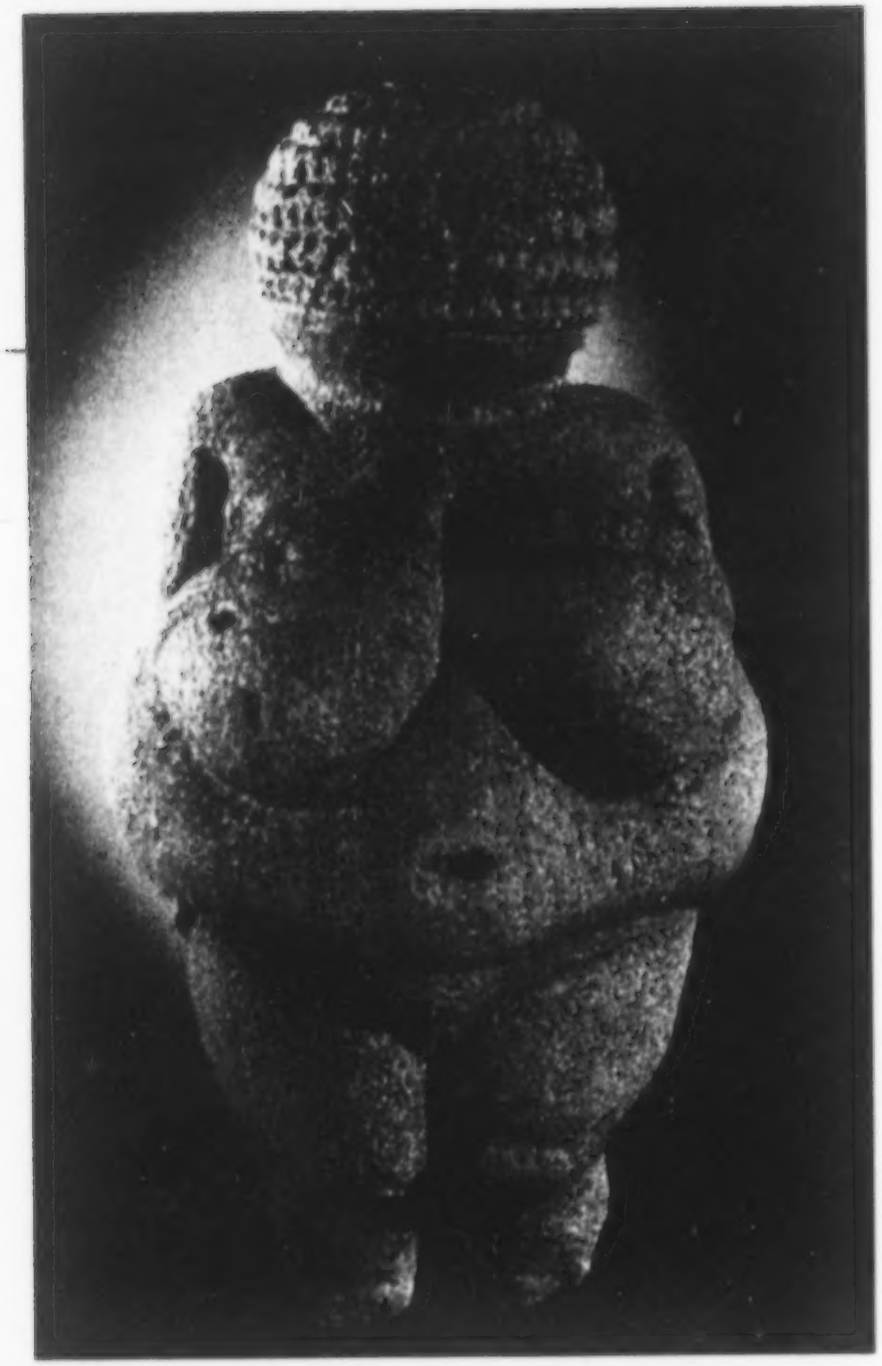
A-1 Michelangelo, *David*, 1501-04
A-2 Jan van Hemessen, *Madonna and Child*, 1543
A-3 Fon? bo, Republic of Benin
A-4 Venus of Willendorf, Paleolithic
A-5 Jagaddeva, *The Goddess Sarasvati*, 1153
A-6 Edward Weston, *Half Nude*, 1924
A-7 Louise Bourgeois, *Fillette*, 1968
A-8 Cindy Sherman, *Untitled #261*, 1991 (Courtesy of the artist and Metro Pictures)
A-9 Robert Colescott, *I Gets a Thrill Too When I Sees De Koo*, 1978
A-10 Philip Pearlstein, *Punch on a Ladder #3*, 1996
A-11 Auguste Rodin, *The Kiss*, 1886-98
A-12 Pablo Picasso, *Minotaur Assaulting Girl*, 1933
A-13 Pablo Picasso, *Les Demoiselles D'Avignon*, 1907
A-14 Edouard Manet, *Déjeuner sur L'Herbe*, 1863
A-15 Egon Schiele, *Autoportrait Se Masturbant*, 1911



Michelangelo
David, 1501-04

Jan van Hemessen
Madonna and Child, 1543

Fon ? bo
Republic of Benin

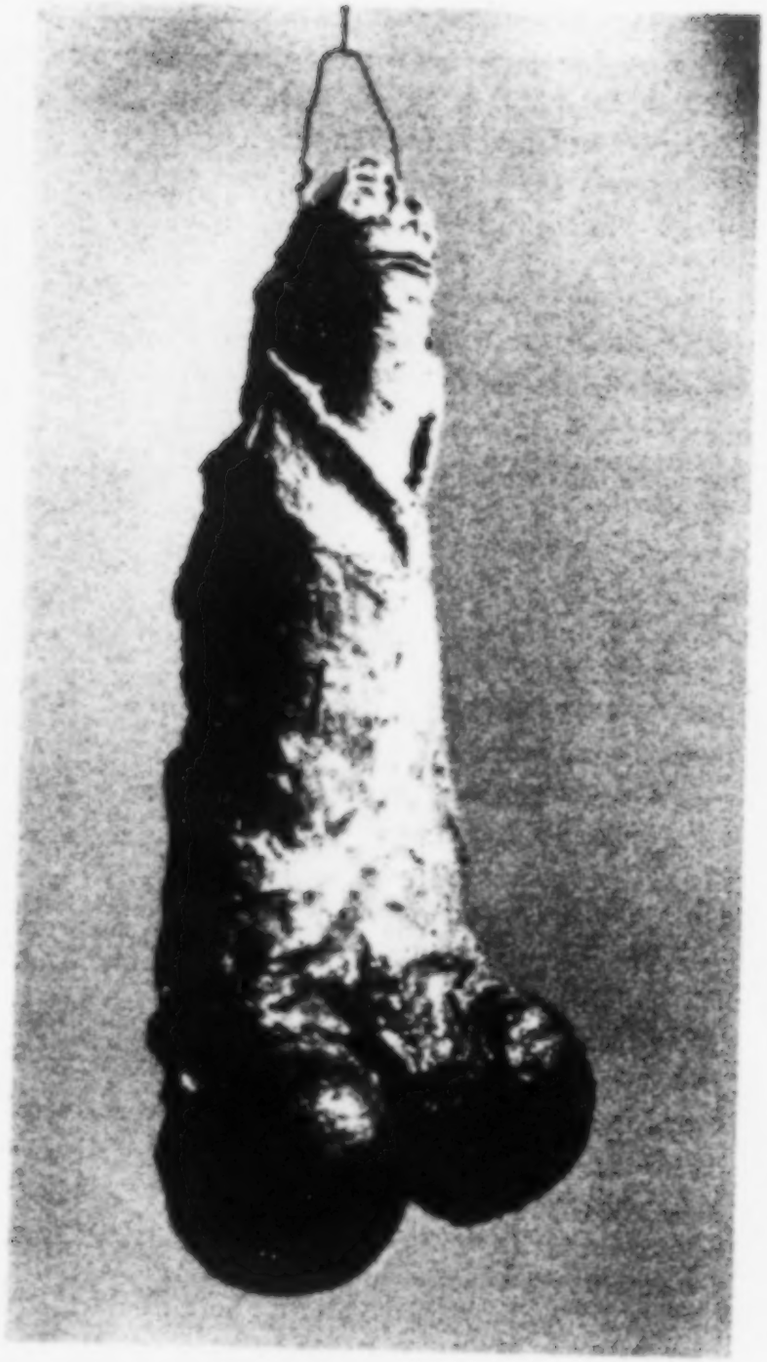


Venus of Willendorf
Paleolithic

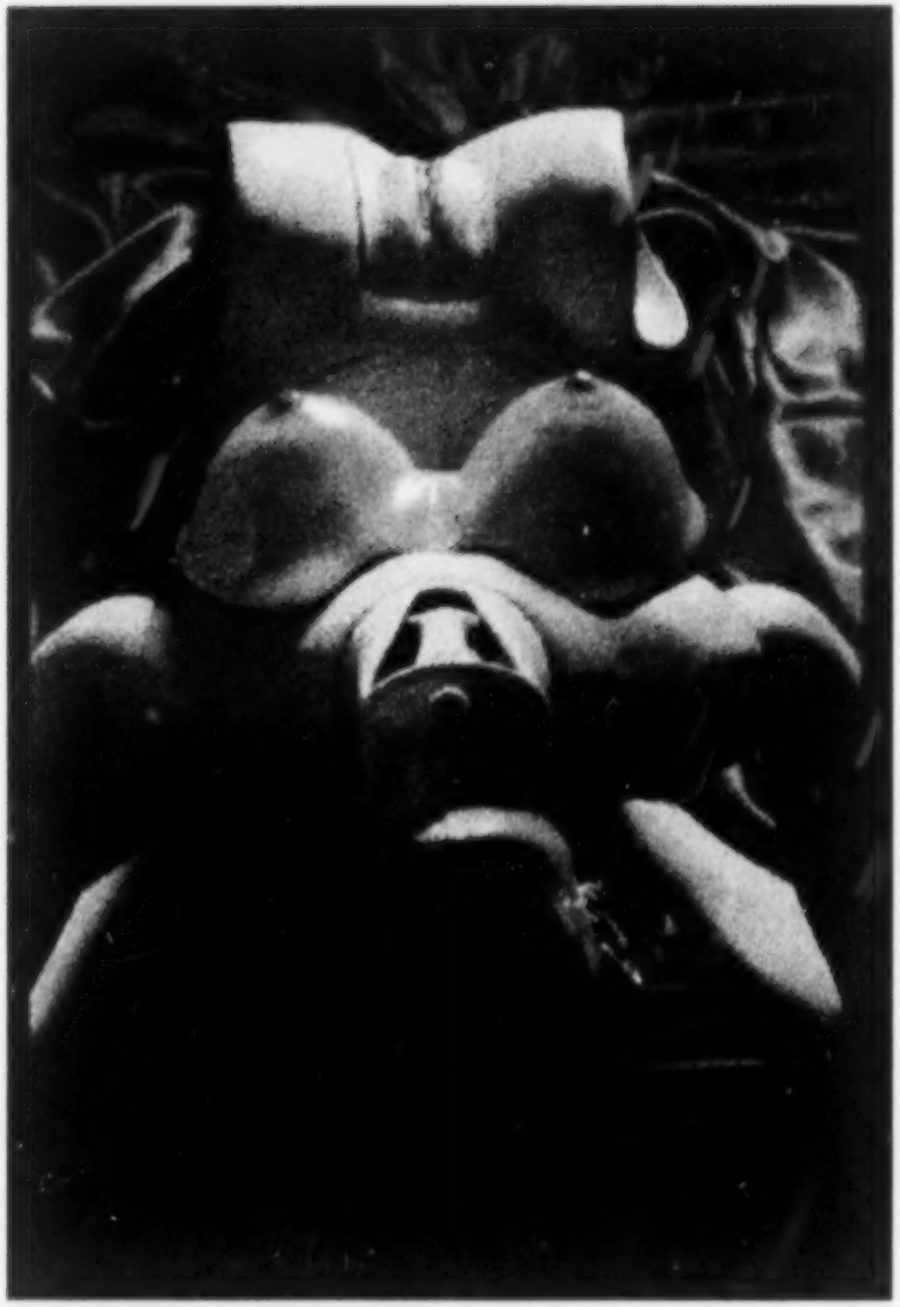
http://www.lacma.org/Masterpieces/mast099.htm

Jagaddeva
The Goddess Saraswati, 1153

Edward Weston
Half Nude, 1924

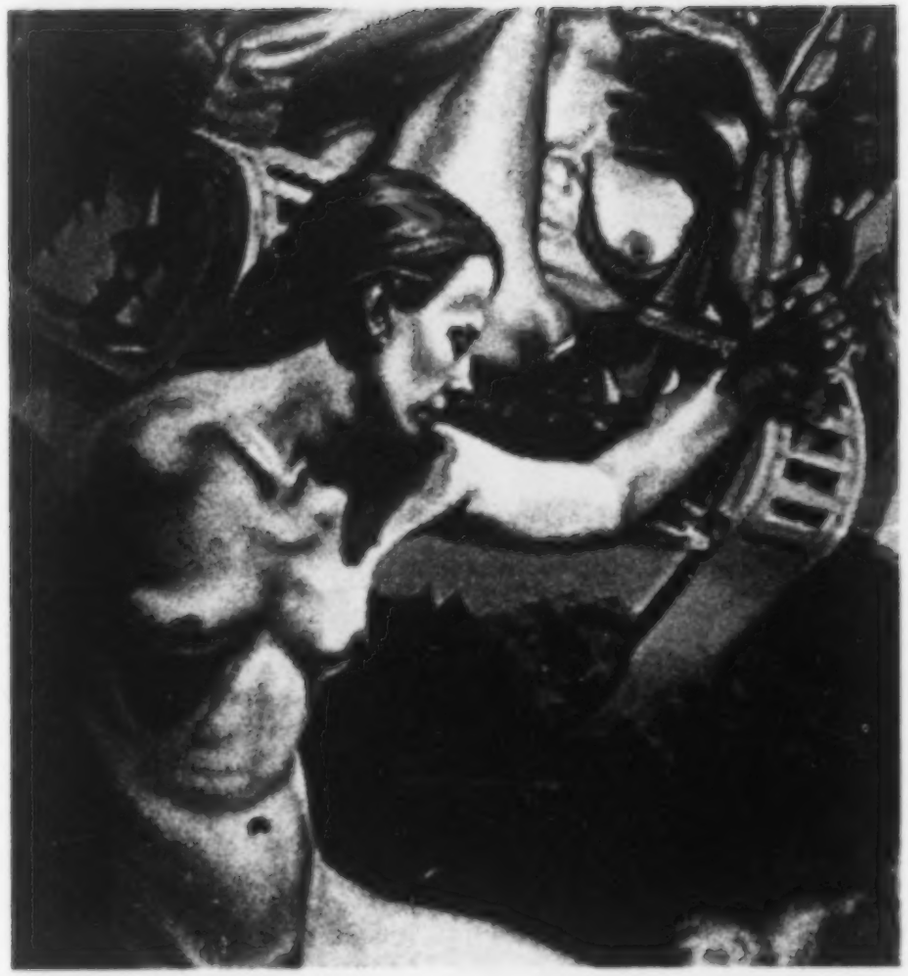


Louise Bourgeois
Fillette, 1968



Cindy Sherman
Untitled #261, 1992
(Courtesy of the artist and Metro Pictures)

Robert Colescott
I Gets a Thrill Too When I Sees De Koo, 1978



Philip Pearlstein
Punch on a Ladder #3, 1996

Auguste Rodin
The Kiss, 1886-98

Pablo Picasso
Minotaur Assaulting Girl, 1933

Pablo Picasso
Les Demoiselles D'Avignon, 1907

Edouard Manet
Déjeuner sur L'Herbe, 1863

Egon Schiele
Autoportrait Se Masturbant, 1911

APPENDIX B

B-1 *Lysistrata*, Aristophanes
B-2 *Angels in America, Part One: Millennium Approaches*, Tony Kushner
B-3 *janet*, Janet Jackson
B-4 *The Diary of a Young Girl: The Definitive Edition*, Anne Frank
B-5 *Jagged Little Pill*, Alanis Morissette
B-6 *The Widower's Tango*, Pablo Neruda
B-7 *Love for Sale*, Cole Porter
B-8 *The Color Purple*, Alice Walker

B-1. **LYSISTRATA,** Aristophanes.

She's gone and left me with an anguished pulse.
What shall I put thee in (O woe!)
Since into something thou must go,
Poor little lad . . . he pines and peeks.
Our lovely girl has proved a curse.
(Where's Cynalopex?)
A nurse to cherish him, a nurse!

MEN. Balked in your amorous delight
How melancholy is your plight.
With sympathy your case I view!
What loins, I ask, what liver too,
What cods, what buttocks, could sustain
This awful stretch and stiffening strain,
And not a single trace
Of lewd-thighed wenches in the place!

CINESIAS. O Zeus, what sinewy suffering!

MEN. She did it all, the harlot, she
With her atrocious harlotry.

WOMEN. Nay, rather call her darling sweet.

MEN. What, sweet? She's a rude, wicked thing.

CINESIAS. A wicked thing, as I repeat.
O Zeus, O Zeus,
Canst thou not suddenly let loose
Some twirling hurricane to tear
Her flapping up [along the air
And drop her, when she's whirled around,
Here to the ground
Neatly impaled upon this stake
That rises only for her sake.

B-2. **ANGELS IN AMERICA, PART ONE: MILLENNIUM APPROACHES**, Tony Kushner, (New York, NY: Theatre Communications Group, 1992.)

p. 39

Prior: I like this; very zen; it's...reassuringly incomprehensible and useless. We who are about to die thank you.

Louis: You are not about to die.

Prior: It's not going well, really...two new lesions. My leg hurts. There's protein in my urine, the doctor says, but who knows what the fuck that portends. Anyway, it shouldn't be there, the protein. My butt is chapped from diarrhea and yesterday I shat blood.

Louis: I really hate this. You don't tell me...

Prior: You get too upset, I wind up comforting you. It's easier...

Louis: Oh thanks.

Prior: If it's bad I'll tell you.

Louis: Shitting blood sounds bad to me.

Prior: And I'm telling you.

Louis: And I'm handing it.

Prior: Tell me some more about justice.

Louis: I *am* handling it.

Prior: Well Louis you win Trooper of the Month.

(*Louis starts to cry.*)

p. 44-45

Henry: Roy, you have been seeing me since 1958. Apart from the facelifts I have treated you for everything from syphilis...

Roy: From a whore in Dallas.

Henry: From syphilis to venereal warts. In your rectum. Which you may have gotten from a whore in Dallas, but it wasn't a female whore.

(Pause.)

Roy: So say it.

Henry: Roy Cohn, you are...

You have had sex with men, many many times, Roy, and one of them, or any number of them, has made you very sick. You have AIDS.

Roy: AIDS.

Your problem, Henry, is that you are hung up on words, on labels, that you believe they mean what they seem to mean. AIDS. Homosexual. Gay. Lesbian. You think these are names that tell you who someone sleeps with, but they don't tell you that.

Henry: No?

Roy: No. Like all labels they tell you one thing and one thing only: where does an individual so identified fit in the food chain, in the pecking order? Not ideology, or sexual taste, but something much simpler: clout. Not who I fuck or who fucks me, but who will pick up the phone when I call, who owes me favors. This is what a label refers to. Now to someone who does not understand this, homosexual is what I am because I have sex with

men. But really this is wrong. Homosexuals are not men who sleep with other men. Homosexuals are men who in fifteen years of trying cannot get a pissant antidiscrimination bill through City Council. Homosexuals are men who know nobody and who nobody know. Who have zero clout. Does this sound like me, Henry?

B-3. **janet**, Janet Jackson.

"If"

"Take your time, we've got all night
You on the rise as you're touchin' my thighs
And let me know what you like.
If you like, I'll go down...
I'll hold you in my hand and baby
Your smooth and shiny feels good against my lips, sugar
I want you so bad I can taste your love."

B-4. **DIARY OF A YOUNG GIRL: THE DEFINITIVE VERSION**, Anne Frank.

Thursday, January 6, 1944

Dearest Kitty,

Today I have two things to confess. It's going to take a long time, but I have to tell them to someone, and you're the most likely candidate, since I know you'll keep a secret, no matter what happens.

The first is about Mother. As you know, I've frequently complained about her and then tried my best to be nice. I've suddenly realized what's wrong with her. Mother has said that she sees us more as friends than as daughters. That's all very nice, of course, except that a friend can't take the place of a mother. I need my mother to set a good example and be a person I can respect, but in most matters she's an example of what *not* to do. I have the feeling that Margot thinks so differently about these things that she'd never be able to understand what I've just told you. And Father avoids all conversations having to do with Mother.

I imagine a mother as a woman who, first and foremost, possesses a great deal of tact, especially toward her adolescent children, and not one who, like Momsy, pokes fun at me when I cry. Not because I'm in pain, but because of other things.

This may seem trivial, but there's one incident I've never forgiven her for. It happened one day when I had to go to the dentist. Mother and Margot planned to go with me and agreed I should take my bicycle. When the dentist was finished and we were back outside, Margot and Mother very sweetly informed me that they were going downtown to buy or look at something, I don't remember what, and of course I wanted to go along. But they said I couldn't come because I

had my bike with me. Tears of rage rushed to my eyes, and Margot and Mother began laughing at me. I was so furious that I stuck my tongue out at them, right there on the street. A little old lady happened to be passing by, and she looked terribly shocked. I rode my bike home and must have cried for hours. Strangely enough, even though Mother has wounded me thousands of times, this particular wound still stings whenever I think of how angry I was.

I find it difficult to confess the second one because it's about myself. I'm not prudish, Kitty, and yet every time they give a blow-by-blow account of their trips to the bathroom, which they often do, my whole body rises in revolt.

Yesterday I read an article on blushing by Sis Heyster. It was as if she'd addressed it directly to me. Not that I blush easily, but the rest of the article did apply. What she basically says is that during puberty girls withdraw into themselves and begin thinking about the wondrous changes taking place in their bodies. I feel that too, which probably accounts for my recent embarrassment over Margot, Mother and Father. On the other hand, Margot is a lot shyer than I am, and yet she's not in the least embarrassed.

I think that what's happening to me is so wonderful, and I don't just mean the changes taking place on the outside of my body, but also those on the inside. I never discuss myself or any of these things with others, which is why I have to talk about them to myself. Whenever I get my period (and that's only been three times), I have the feeling that in spite of all the pain, discomfort and mess, I'm carrying around a sweet secret. So even though it's a nuisance, in a certain way I'm always looking forward to the time when I'll feel that secret inside me once again.

Sis Heyster also writes that girls my age feel very insecure about themselves and are just beginning to discover

that they're individuals with their own ideas, thoughts and habits. I'd just turned thirteen when I came here, so I started thinking about myself and realized that I've become an "independent person" sooner than most girls. Sometimes when I lie in bed at night I feel a terrible urge to touch my breasts and listen to the quiet, steady beating of my heart.

Unconsciously, I had these feelings even before I came here. Once when I was spending the night at Jacque's, I could no longer restrain my curiosity about her body, which she'd always hidden from me and which I'd never seen. I asked her whether, as proof of our friendship, we could touch each other's breasts. Jacque refused. I also had a terrible desire to kiss her, which I did. Every time I see a female nude, such as the Venus in my art history book, I go into ecstasy. Sometimes I find them so exquisite I have to struggle to hold back my tears. If only I had a girlfriend!

B-5. **JAGGED LITTLE PILL**, Alanis Morissette.

"You Oughta Know"

"An older version of me
Is she perverted like me
Would she go down on you in a theatre?"

"It was a slap in the face
How quickly I was replaced

And are you thinking of me when you fuck her?"

B-6. **THE WIDOWER'S TANGO***, Pablo Neruda.

"Oh evil one, you must by now have found the letter, you
must have wept with fury,
and you must have insulted my mother's memory,
calling her rotten bitch and mother of dogs,
you must have drunk alone, all by yourself, your twilight tea,
looking at my old shoes forever empty,
and you won't be able any longer to recall my illnesses, my
night dreams, my meals,
without cursing me aloud as if I were still there,
complaining about the tropics, about the *corringhis* coolies,
about the poisonous fevers that did me so much harm,
and about the frightful Englishmen that I still hate.

Evil one, really, what an enormous night, what a lonely earth!
I have come again to the solitary bedrooms,
to lunch on cold food in the restaurants, and again
I throw my trousers and shirts upon the floor,
there are no coat hangers in my room, no pictures of anyone
on the walls.
How much of the darkness in my soul I would give to get you
back,
and how threatening to me seem the names of the months,
and the word "winter," what a mournful drum sound it has.

Buried next to the coconut tree you will later find
the knife that I hid there for fear that you would kill me,
and now suddenly I should like to smell its kitchen steel

* Neruda was a widower only to the extent that he thought he had escaped from Josie Bliss, the Burmese girl to whom this poem is addressed. See also p. 206 -- D.D.W.

accustomed to the weight of your hand and the shine of your
foot:
under the moisture of the earth, among the deaf roots,
of all human languages the poor thing would know only your
name,
and the thick earth does not understand your name
made of impenetrable and divine substances.

Just as it afflicts me to think of the clear day of your legs
curled up like still and harsh solar waters,
and the swallow that sleeping and flying lives in your eyes,
and the furious dog that you shelter in your heart,
so too I see the deaths that are between us from now on,
and I breathe in the air ashes and destruction,
the long, solitary space that surrounds me forever.

I would give this giant sea wind of your brusque breath
heard in long nights with no mixture of oblivion,
merging with the atmosphere like the whip with the horse's
hide.
And to hear you making water in the darkness, at the back of
the house,
as if spilling a thin, tremulous, silvery, persistent honey,
how many times would I give up this chorus of shadows that
I possess,
and the noise of useless swords that is heard in my heart,
and the bloody dove that sits alone on my brow
calling for vanished things, vanished beings,
substances strangely inseparable and lost.

B-7. **LOVE FOR SALE**, Cole Porter.

VERSE

When the only sound in the empty street
is the heavy tread of the heavy feet
that belong to a lonesome cop,
I open shop.
When the moon so long has been gazing down
on the wayward ways of this wayward town
that her smile becomes a smirk,
I go to work.

REFRAIN

Love for Sale,
appetizing young love for sale.
Love that's fresh and still unspoiled,
Love that only slightly soiled,
Love for Sale.
Who will buy?
Who would like to sample my supply?
Who's prepared to pay the price
for a trip to paradise?
Love for Sale.
Let the poets pipe of love
in their childish way,
I know ev'ry type of love
better far than they.
If you want the thrill of love,
I've been thru the mill of love,
old love, new love,
ev'ry love but true love.
Love for Sale,
appetizing young love for sale.
If you want to buy my wares
follow me and climb the stairs,
Love for Sale.

B-8. **THE COLOR PURPLE,** Alice Walker.

You better not never tell nobody but God. It'd kill your mammy.

Dear God,

I am fourteen years old. I have always been a good girl. Maybe you can give me a sign letting me know what is happening to me.

Last spring after little Lucious come I heard them fussing. He was pulling on her arm. She say It too soon, Fonso, I ain't well. Finally he leave her alone. A week go by, he pulling on her arm again. She say Naw, I ain't gonna. Can't you see I'm already half dead, an all of these chilren.

She went to visit her sister doctor over Macon. Left me to see after the others. He never had a kine word to say to me. Just say You gonna do what your mammy wouldn't. First he put his thing up gainst my hip and sort of wiggle it around. Then he grab hold my titties. Then he push his thing inside my pussy. When that hurt, I cry. He start to choke me, saying You better shut up and git used to it.

But I don't never git used to it. And now I feels sick every time I be the one to cook. My mama she fuss at me an look at me. She happy, cause he good to her now. But too sick to last long.

APPENDIX C

VOLUNTEER LAWYERS FOR THE ARTS
ROBERT ALTMAN
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ROBERT BEASER
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